

**A National Union Of Hotel, Bar Restaurant Workers
 Peninsular Malaysia v Tanjong Jara Beach Hotel
 Sdn Bhd**

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-636
OF 1998

**B GOPAL SRI RAM, ABDUL KADIR SULAIMAN AND HASHIM
 YUSOFF JJCA
 23 MAY 2003**

**C *Labour Law — Employment — Collective agreement — Construction of — Whether
 collective agreement to be interpreted in a narrow and pedantic manner***

*Labour Law — Industrial Court — Award — Employer attempting to evade obligations
under collective agreement — Award made against employer — Industrial Court acting in
accordance with well established principles of industrial law and equity — Whether
Industrial Court erred in making the award*

**D *Labour Law — Industrial Court — Jurisdiction — Whether Industrial Court had
 threshold jurisdiction to interpret collective agreement***

**E The appellant trade union had some of its members employed as
workmen of the respondent hotel. The contract of employment of the
workmen was housed in a collective agreement entered into between
the parties. The collective agreement provided, inter alia, that bonus
was payable to every workman in the employment of the respondent
at 31 December each year. On 1 September 1993, the respondent
gave the appellant notice that it was closing down its operation with
effect from 1 December 1996 in order to carry out renovations to its
premises. The respondent simultaneously served on its workmen
individual notices of termination of service to take effect from
1 December 1996. The respondent paid all emoluments to the
appellant's workmen up to the date the termination took effect.
**F However, it did not pay the workmen any bonus. It was the
respondent's case that since the workmen had their services
terminated on 1 December 1996, none of them remained in its'
(respondent's) service as at 31 December 1996 and hence no bonus
was payable to any of them for the year 1996. The Industrial Court
held that on a true interpretation of the bonus provision, the
respondent was obliged to pay bonus on a pro rata basis to the affected
workmen. The respondent's application to quash the decision of the
Industrial Court was allowed by the High Court. The appellant thus
appealed to the Court of Appeal. The Court of Appeal had to
determine: (i) whether the Industrial Court had jurisdiction to
exercise its interpretive powers under s 33 of the Industrial Relations
Act 1967 in non-compliance proceedings brought under s 56 of the
Act; and (ii) whether the interpretation by the Industrial Court of the
collective agreement disclosed an error of law.****

Held, allowing the appellant's appeal:

- (1) The Industrial Court had threshold jurisdiction to interpret the collective agreement in order to determine whether there had been non-compliance thereof (see p 54C); *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union* [1995] 2 MLJ 317 followed.
- (2) A collective agreement is a document that regulates the relationship between parties in the environment of industrial relations. It is therefore wrong to approach such a document as though it were a formal deed of conveyance falling for interpretation before the Chancery Division of the High Court of England (see p 54C-D); *Kesatuan Pekerja-Pekerja Perakayan v Sykt Jengka Sdn Bhd* [1996] 3 MLJ 464 followed. On the facts, the High Court was wrong in accepting the respondent's invitation to interpret the collective agreement in a narrow and pedantic manner (see p 55H).
- (3) This was a case in which the respondent took careful steps to evade its obligations under the collective agreement. It ensured that none of the workmen concerned were in its employment at the contractually operative date for the sole purpose of preventing them from claiming the bonus payment. The respondent's conduct thus smacked of unfair labor practice. The Industrial Court, acting in accordance with well established principles of industrial law and equity, found against the respondent. No error of law could be detected in its award. Any reasonable tribunal armed with the material presented to the Industrial Court in the instant case would have come to a similar decision (see pp 55H-56A).

[Bahasa Malaysia summary]

Perayu persatuan pekerja mempunyai beberapa ahlinya yang bekerja sebagai pekerja responden hotel. Kontrak pekerjaan pekerja-pekerja tersebut dibuat dalam satu perjanjian kolektif yang dimasuki oleh pihak-pihak tersebut. Perjanjian kolektif tersebut memperuntukkan, antara lain, bahawa bonus perlu dibayar kepada setiap pekerja yang bekerja dengan responden pada 31 Disember setiap tahun. Pada 1 September 1993, responden telah memberikan perayu notis bahawa ia akan menutup operasinya berkuatkuasa mulai 1 Disember 1996 bagi tujuan menjalankan pengubahsuaian ke atas premisnya. Responden dengan serentak telah menyampaikan ke atas pekerja-pekerjanya notis-notis penamatan perkhidmatan yang berasingan berkuatkuasa mulai 1 Disember 1996. Responden telah membayar semua emolumen-emolumen kepada pekerja-pekerja perayu setakat tarikh penamatan berkuatkuasa. Namun begitu, ia tidak membayar pekerja-pekerja tersebut apa-apa bonus. Ia adalah kes responden di mana memandangkan pekerja-pekerja tersebut telah ditamatkan perkhidmatan mereka pada 1 Disember 1996, tiada di antara mereka

- A kekal dalam perkhidmatannya (responden) pada 31 Disember 1996 dan justeru itu tiada bonus perlu dibayar kepada mana-mana daripada mereka untuk tahun 1996. Mahkamah Perusahaan telah memutuskan bahawa berdasarkan tafsiran sebenar peruntukan mengenai bonus, responden bertanggungjawab untuk membayar bonus berdasarkan pro rata kepada pekerja-pekerja yang terlibat. Permohonan responden
- B untuk membatalkan keputusan Mahkamah Perusahaan telah dibenarkan oleh Mahkamah Tinggi. Perayu oleh itu telah merayu kepada Mahkamah Rayuan. Mahkamah Rayuan perlu menentukan bahawa: (i) sama ada Mahkamah Perusahaan mempunyai bidang kuasa untuk menggunakan kuasa-kuasa penafsirannya di bawah s 33 Akta Perhubungan Perusahaan 1967 dalam prosiding ketidakpatuhan yang dimulakan di bawah s 56 Akta tersebut; dan (ii) sama ada tafsiran oleh Mahkamah Perusahaan terhadap perjanjian kolektif menunjukkan satu kesilapan undang-undang.

Diputuskan, membenarkan rayuan perayu:

- D (1) Mahkamah Perusahaan mempunyai bidang kuasa untuk menafsir perjanjian kolektif tersebut bagi tujuan menentukan sama ada tidak terdapat ketidakpatuhan (lihat ms 54C); *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union* [1995] 2 MLJ 317 diikuti.
- E (2) Satu perjanjian kolektif adalah satu dokumen yang mengawal hubungan antara pihak-pihak dalam persekitaran perhubungan perusahaan. Oleh itu ia adalah salah untuk mendekati dokumen sedemikian seperti ia adalah satu suratikatan pemindahhakan yang formal yang perlu ditafsirkan di hadapan Chancery Division di Mahkamah Tinggi England (lihat ms 54C-D); *Kesatuan Pekerja-Pekerja Perkayuan v Sykt Jengka Sdn Bhd* [1996] 3 MLJ 464 diikuti. Berdasarkan fakta-fakta berikut, Mahkamah Tinggi adalah salah dalam menerima undangan responden untuk menafsir perjanjian kolektif tersebut dengan cara terhad dan terlalu teliti (lihat ms 55H).
- G (3) Ini merupakan satu kes di mana responden telah mengambil langkah-langkah berjaga-jaga untuk mengelak daripada obligasi-obligasinya di bawah perjanjian kolektif. Ia memastikan bahawa tiada daripada pekerja-pekerja berkenaan bekerja dengannya pada tarikh kontrak berkuatkuasa semata-mata bagi tujuan mengelakkan mereka daripada menuntut bayaran bonus. Perbuatan responden oleh demikian berunsurkan amalan kerja yang tidak adil. Mahkamah Perusahaan, yang bertindak menurut prinsip-prinsip tetap undang-undang perusahaan dan ekuiti, membuat penemuan terhadap responden. Tiada kesilapan undang-undang ditemui dalam awardnya. Apa-apa tribunal yang munasabah yang dilengkapi dengan bahan-bahan yang dikemukakan di Mahkamah Perusahaan dalam kes semasa akan tiba kepada satu keputusan yang sama (lihat ms 55H-56A).]
- H
- I

Notes**A**

For cases on awards in the Industrial Court, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1178–1214.

For cases on collective agreements, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 756–758.

For cases on jurisdiction of the Industrial Court, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1248–1294.

B**Cases referred to**

Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369 (refd)

C

Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd [1997] 2 MLJ 685 (refd)

Kesatuan Pekerja-Pekerja Perakayuan v Syarikat Jengka Sdn Bhd [1996] 3 MLJ 464 (folld)

Progress Castings (1982) Sdn Bhd v Metal Industry Employees Union [1983] 2 ILR 250 (refd)

D

Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317 (folld)

Legislation referred to**E**

Industrial Relations Act 1967 ss 33, 56

Appeal from: Originating Motion No R3–25–154 of 1997 (High Court, Kuala Lumpur)

N Mahalingam (Genga Maha Wong & Co) for the appellant.

F

Thavalingam Thavarajah (Zaid Ibrahim & Co) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court): This is the judgment of the court.

This appeal was argued yesterday. At the conclusion of arguments, we reserved judgment to today. Our decision and the attendant reasons now follow.

G

There are two short points in this appeal. The first is whether the Industrial Court has jurisdiction to exercise its interpretive powers under s 33 of the Industrial Relations Act 1967 ('the Act') in non-compliance proceedings brought under s 56 of the Act. The second question is whether the interpretation by that court of the collective agreement in the instant case discloses an error of law.

H

It must be recognized at once that the first issue concerns the threshold jurisdiction of the Industrial Court or jurisdiction in the narrower sense (see *Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd* [1997] 2 MLJ 685). The second is concerned with jurisdiction in the wider sense or what has come to be known as 'Anisminic jurisdiction' (see *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369).

I

A Before we deal with each of the points raised in this appeal, it is necessary to hearken to the facts.

The appellant is a trade union. At all material times, some of its members were employed as workmen by the respondent which is an hotel. The contract of employment of these workmen was housed in a collective agreement entered into between the parties. On 1 September 1996, the respondent gave the appellant notice that it was closing down its operations with effect from 1 December 1996 in order to carry out renovations to its premises. The respondent simultaneously served on its workmen individual notices of termination of service to take effect from 1 December 1996. The respondent paid all emoluments to the appellant's workmen up to the date the termination took effect. But it did not pay the workmen any bonus. The reason for this omission forms the core of the dispute between the parties.

According to the relevant article in the collective agreement, bonus is payable to every workman who is in the employment of the respondent at 31 December of each year. The respondent's case is ingenious. It is to the following effect. All the affected members of the appellant had had their services terminated on 1 December 1996. Therefore none of them were in the appellant's service as at 31 December of that year. Hence, no bonus is payable to any of them for the year 1996.

Now, despite its ingenuousness, the Industrial Court saw through the argument. It held that on a true interpretation of the bonus provision as applied to the facts of this case, the respondent was obliged to pay bonus on a pro rata basis to the affected workmen. In doing so it relied on the following pronouncement of Harun J (as he then was) in *Progress Castings (1982) Sdn Bhd v Metal Industry Employees Union* [1983] 2 ILR 250:

The Company contends that it was the intention of the parties to pay bonus at the end of each year and therefore it is payable only if a year has been completed. We are in agreement with the Company that the bonus is payable only at the end of each calendar year but this is so if the Company is still in operation. In the present case, the Company has closed down and the question is whether bonus is payable on closure of business. We find that the bonus payable is not conditional on the Company making a profit. It is in fact Deferred Salary Payment and therefore the employees are entitled to a proportion of that payment for the period they have actually worked.

Dissatisfied, the respondent applied for judicial review to quash the decision of the Industrial Court. Its application was granted. The union now appeals to us against the decision of the High Court.

H We now turn to address the first issue. This in our view is concluded by authority.

In *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317, it was held by this court that 'ss 33(1) and 56 cannot be treated as being housed in watertight compartments with no permissible overlap under any circumstances.'

I It was further held as follows :

There may be circumstances, such as those as existed in *Federal Hotel v National Union of Hotel, Bar & Restaurant Workers* [1983] 1 MLJ 175, which

may warrant a superior court forming the view that an error of law has been occasioned by the court's unwarranted transgression of the power of interpretation when exercising its power of enforcement. On the other end of the scale, there may be cases in which an interpretation of an award or collective agreement is a *sine qua non* to ascertain whether there has indeed been non-compliance of the same. To say that in such circumstances the complainant is to be summarily driven away from the judgment seat because a question of interpretation has arisen, is to nullify legislative intent, namely, the expeditious settlement of industrial disputes. It follows therefore, that the extreme proposition that the court, when considering a complaint under s 56(1), may never interpret an award or collective agreement in any circumstances is fallacious and not worthy of a second glance.

In our judgment, the Industrial Court had threshold jurisdiction to interpret the collective agreement in order to determine whether there had in fact been non-compliance thereof.

That brings us to the second question. Here it is necessary to bear in mind the nature of the instrument that has come up for interpretation. It is a document that regulates the relationship between parties in the environment of industrial relations. It is therefore wrong to approach such a document as though it were a formal deed of conveyance falling for interpretation before the Chancery Division of the High Court of England.

As this court said in *Kesatuan Pekerja-Pekerja Perakayuan v Syarikat Jengka Sdn Bhd* [1996] 3 MLJ 464, at p 475:

First, it is important to bear in mind that the ordinary rules of construction — whose assistance courts often pray in aid to determine contractual intention — do not apply when interpreting a collective agreement. An application of these rules will necessarily involve a rather strict and legalistic approach which is to be avoided in a case such as the present. Parliament, fully realizing that a just solution may not result in the field of industrial relations by the application of the rules of interpretation that operate in the environment of the common law, has enacted s 30(5) of the Act, which reads as follows:

'The Court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.' Secondly, due recognition should be accorded to the fact that a collective agreement is not a commercial document entered into between businessmen aided by legal advice. A collective agreement deals with far more basic issues that relate to the livelihood of workmen, such as their wages and other rudimentary benefits that are essential for sustaining life. It will therefore be unsurprising to find such agreements couched in rather loose language, often lacking the degree of precision with which lawyers are familiar. A reasonable and pragmatic approach, shorn of an excess of legal learning, is therefore called for when construing a collective agreement, and in particular, any machinery that the workmen and their employer have established for the resolution of their differences.

We may add that we find much support for the view we take of the matter — in particular, the broad and liberal approach that is to be adopted to the construction of collective agreements — from the following passages in the judgment of Shah J in *Delhi Cloth Mills Co Ltd v Its Workmen* (1969) 2 LLJ 755 at pp 767 and 768:

A ‘We consider it right to observe that in adjudication of industrial disputes settled legal principles have little play: the awards made are often the result of ad hoc determination of disputed questions, and each determination forms a precedent for determination of other disputes. An attempt to search for principle from the law built up on those precedents is a futile exercise. To the courts accustomed to apply settled principles to facts determined by the application of the judicial process, an essay into the unsurveyed expanses of the law of industrial relations with neither a compass nor a guide, but only the pillars of precedents is a disheartening experience. The Constitution [and, in Malaysia, Parliament] has, however, invested this court with power to sit in appeal over the awards of industrial tribunals which are, it is said, founded on the somewhat hazy background of maintenance of industrial peace, which secures the prosperity of the industry and improvement of the conditions of workmen employed in the industry, and in the absence of principles precedents may have to be adopted as guides — somewhat reluctantly — to secure some reasonable degree of uniformity or harmony in the process.

B

C

D But in the branch of law relating to industrial relations, the temptation to be crusaders instead of adjudicators must be firmly resisted. It would not be out of place to remember the statement of the law made in a different context but nonetheless appropriate here — by Douglas J of the Supreme Court of the United States in *United Steel Workers of America v Enterprise Wheel & Car Corp* [(1960) 363 US 593]:

E “... as arbitrator ... does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator’s words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the awards.”

F We may at once state that we are not for a moment suggesting that the law of industrial relations developed in our country has proceeded on lines parallel to the direction of the law in the United States.

G We may repeat that in matters relating to the grant of gratuity and even generally in the settlement of disputes arising out of industrial relations, there are no fixed principles, on the application of which the problems arising before the tribunals or the courts may be determined; and often precedents of cases determined ad hoc are utilized to build up claims or to resist them. It would, in the circumstances, be futile to attempt to reduce the grounds of the decisions given by the industrial tribunals, the Labour Appellate Tribunal and the High Courts to the dimensions of any recognized principle.’

H It is with these matters in mind that we approach the inquiry whether the Industrial Court placed an erroneous interpretation on the first award and the collective agreement.

I It is in this area, we think, that the High Court fell into error. In our view, it was wrong in accepting the respondent’s invitation to interpret the collective agreement in a narrow and pedantic manner.

 This is a case in which the respondent took careful steps to evade its obligations under the collective agreement. It ensured that none of the workmen concerned were in its employment at the *contractually* operative date for the sole purpose of preventing them from claiming the bonus payment. In our judgment, the respondent’s conduct smacks of unfair

labour practice. The Industrial Court, acting in accordance with well established principles of industrial law and equity, found against the respondent. We are unable to detect any error of law in its award. Further, we are satisfied that any reasonable tribunal armed with the material presented to the Industrial Court in this case would have come to like decision.

For the reasons already given this appeal must succeed and the orders usually consequent upon success will be made.

Appellant's appeal allowed.

Reported by Andrew Christopher Simon

A**B****C****D****E****F****G****H****I**